

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20544

RECEIVED

MAR 20 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Allocation of Spectrum Below )  
5 GHz Transferred from )  
Federal Government Use )

ET Docket No. 94-32

DOCKET FILE COPY ORIGINAL

**COMMENTS OF RAND McNALLY & COMPANY**

Rand McNally & Company ("RMC") hereby submits the following comments in response to the First Report and Order and Second Notice of Proposed Rule Making released on February 17, 1995, in the above-referenced proceeding (the "Notice").

RMC is the copyright owner of the MTA/BTA Listings, embodied in its Trading Area System MTA/BTA Diskette, and graphically represented in its Commercial Atlas & Marketing Guide (the "MTA/BTA Map").<sup>1</sup> We understand that the Commission is proposing adopting MTAs as the geographic boundaries to determine service areas for licensing spectrum, transferred from federal government use, in the 4660-4685 MHz band that the Commission has allocated to Fixed and Mobile services ("the Spectrum").<sup>2</sup> We submit these comments to assert our strong objection to any attempt to make RMC's MTAs or BTAs the geographic boundaries for service areas for the Spectrum, without a license from RMC.

**I. RMC HAS NOT LICENSED USE OF ITS MTA/BTA LISTINGS IN CONNECTION WITH THE SPECTRUM.**

The MTA/BTA Listings are valuable intellectual property. RMC has made a substantial investment in their development.

RMC has *not* licensed the MTA/BTA Listings in connection with the Spectrum. To date, RMC has licensed use of its MTA/BTA Listings for use only in connection with the following services:

<sup>1</sup> The MTA/BTA Listings and the MTA/BTA Map are referred to collectively herein as the "MTA/BTA Listings."

<sup>2</sup> Notice at ¶ 79.

No. of Copies rec'd at 6  
List A B C D E

- (i) 2 GHz broadband Personal Communications Services ("PCS"), as authorized in GEN Docket 90-314 or any successor proceedings;
- (ii) 900 MHz narrowband PCS, as authorized in GEN Docket No. 90-314 and ET Docket 92-100 or any successor proceedings;
- (iii) 800 MHz wide-area Specialized Mobile Radio Services or Expanded Mobile Service Providers, as authorized in PR Docket No. 93-144 or any successor proceedings; and
- (iv) Local Multipoint Distribution Services, as authorized in CC Docket No. 92-297 or any successor proceedings.

The existing license came about after RMC learned, in late 1993, that the Commission was considering use of MTAs and BTAs as the geographic boundaries for service areas for certain types of personal communications services. We objected, explaining that the Commission could not adopt such MTA/BTA service areas without RMC's consent, as the MTA/BTA Listings are protected by copyright and such action would constitute an unlawful taking of RMC's property.

Subsequently, RMC was approached by PCIA, the Personal Communications Industry Association. PCIA sought, and RMC granted, a blanket license so that all parties with an interest in the FCC proceedings specified in such license would be permitted to reproduce and use the MTA/BTA Listings *only in connection with those proceedings*, subject to the terms of the license. The blanket license made the MTA/BTA Listings available in various forms to the Commission and to interested parties either directly from RMC, or indirectly through its licensees under the blanket license.

We advised the Commission of our license agreement with PCIA, and of our consent to use of the MTAs and BTAs in the proceedings specified in the blanket license agreement, but only in those proceedings. We indicated then that we were willing to license use of the MTAs and BTAs on reasonable terms for use in other proceedings, if the parties with an interest in those proceedings sought such a license.

Since that time, the Commission mandated use of RMC's MTAs as the geographic boundaries for service areas for 900 MHz specialized mobile radio ("SMR") licenses issued by auction.<sup>3</sup> When the Commission took such action, it also expressly recognized RMC's copyright rights in the MTA/BTA Listings, and that RMC's license with PCIA extends only to certain services.<sup>4</sup> Although RMC assumed that the Commission did not intend to adopt MTAs as the geographic boundaries for service areas for 900 MHz SMRs without RMC's assent, RMC objected on the record to such use in the absence of an MTA/BTA license obtained from RMC.<sup>5</sup>

Subsequently, RMC was approached by AMTA, the American Mobile Telecommunications Association, and AMTA and RMC are in the process of negotiating the terms of a second blanket license agreement that would allow specified use of the MTA/BTA Listings by persons interested in certain Commission proceedings in connection with the 900 MHz SMR service. As the Commission has been advised, an important element and prerequisite of this blanket license agreement is the Commission's acknowledgment that it will include in its future 900 MHz technical Order language notifying potential 900 MHz SMR MTA licensees (1) that use of MTAs for 900 MHz SMR is not covered by any licensing arrangement currently in place, (2) that they may obtain a license for such use by complying with the terms of the RMC/AMTA blanket license agreement or, alternatively, by seeking their own licensing arrangement with RMC, and (3) that, in any event, an MTA-based SMR licensee that does not obtain a copyright license from RMC may not rely on grant of an MTA-based SMR license from the Commission as a defense to any claim of copyright infringement brought by RMC against such grantee.<sup>6</sup> RMC is hopeful that its negotiations with AMTA will conclude in the execution of a blanket license agreement that balances the legitimate interests of RMC in protecting its copyright rights with the interests of the Commission and prospective 900 MHz SMR MTA license grantees.

---

<sup>3</sup> *Third Report and Order*, 9 FCC Rcd 7988, (Sept. 23, 1994) at ¶ 114.

<sup>4</sup> *Id.* at n. 197 and n. 218.

<sup>5</sup> See RMC's *Petition for Reconsideration*, GN Docket No. 93-252 (submitted October 24, 1994).

<sup>6</sup> See *Ex Parte Presentation of RAM Mobile Data USA Limited Partnership*, PR Docket Nos. 89-553, 93-144 and GN Docket No. 93-252 (submitted January 19, 1995).

## II. THE COMMISSION MAY NOT ADOPT MTAs AS THE GEOGRAPHIC BOUNDARIES FOR THE SPECTRUM WITHOUT RMC'S CONSENT.

The Commission has proposed in the Notice that RMC's MTAs should serve as the geographic boundaries of the license areas for the Spectrum, even though RMC has not licensed use of the MTA/BTA Listings in connection with the Spectrum. In so doing, the Commission recognized RMC's copyright in the MTA/BTA Listings and noted that these services were not covered by the existing PCIA license.<sup>7</sup> Notice at 39-40 n. 157.

We appreciate the Commission's recognition of our copyright rights. However, we are troubled by the Commission's failure to encourage interested parties to explore with RMC a licensing arrangement to cover the proposed Spectrum, as it had in earlier proceedings, in the event that the Commission ultimately adopts MTAs as the geographic boundaries to determine service areas.<sup>8</sup> This failure by the Commission suggests to third parties that use of RMC's copyrighted materials in connection with the Spectrum without RMC's consent is permissible and, in this manner, the Commission essentially has invited such parties to disregard RMC's rights.

In this regard, the statement in the Notice that listings of the MTA/BTA Listings are available for public inspection at the Commission<sup>9</sup> improperly implies that potential Spectrum grantees are free to use the MTA/BTA Listings without a license. Rather, such Listings have been made available to the Commission only pursuant to RMC's blanket license agreement with PCIA and only for the services covered thereby. We want to make it clear that we strenuously object to use of our MTA/BTA Listings for any service unless and until an appropriate license is entered.<sup>10</sup>

---

<sup>7</sup> Note that the Spectrum will not be covered under the proposed blanket license with AMTA.

<sup>8</sup> See, e.g., *In the Matter of Amendment of Parts 2 and 15 of the Commission's Rules to Permit Use of Radio Frequencies above 40 GHz for New Radio Applications*, Notice of Proposed Rule Making, ET Docket No. 94-124, (November 8, 1994) at 11-12, n. 28.

<sup>9</sup> Notice at n. 157.

<sup>10</sup> RMC has expended a great deal of time and money to protect its valuable copyrights from the threat that they will be placed in the public domain as a result of Commission actions RMC neither invited nor encouraged. We have made numerous filings in various FCC proceedings asserting our rights, and the Commission is well aware of our position. We are disturbed by the Commission's failure to take appropriate steps to respond to our legitimate concerns about this

The Commission has no authority to adopt service areas based on MTAs and/or BTAs without RMC's consent. The MTA/BTA Listings represent a significant investment on RMC's part. RMC did not propose MTAs or BTAs for licensing in the instant proceeding nor have we done so in any other Commission proceeding. If the Commission mandates use of the MTAs and BTAs absent a license from RMC, it will amount to an unlawful taking of RMC's property. All parties to the relevant proceedings, and anyone with an interest therein, will contend that they may reproduce, adapt, and distribute the MTA/BTA Listings and MTA/BTA Map, effectively removing the copyright protection from these works. Moreover, the Commission itself will be an infringer of RMC's copyright.

We urge the Commission not to adopt MTAs as the geographic boundaries for licensing the Spectrum and, indeed, not to adopt MTAs or BTAs as the geographic boundaries for any other services not covered by an existing RMC license, until an applicable license from RMC has been obtained. We also urge the Commission to make clear to potential Spectrum licensees that unless a licensee obtains a copyright license from RMC (whether pursuant to a blanket license agreement or other, independently negotiated agreement), such Commission licensee may not rely on a grant of an MTA-based Spectrum license from the Commission as a defense to any claim of copyright infringement brought by RMC against it. If prospective licensees are unwilling to enter into a license with RMC, then the Commission should select different service areas for the Spectrum.

We remain willing to license use of the MTA/BTA Listings on reasonable terms so that all parties affected by and interested in Commission proceedings may reproduce, modify and distribute them. RMC will not, however, permit its property to be appropriated without just compensation and due process of law, and will take all necessary steps to remedy any unauthorized exercise of its copyright rights by the Commission or any other party.

### III. CONCLUSION.

We urge the Commission to refrain from jeopardizing RMC's copyright rights. The Commission should not mandate RMC's MTAs or BTAs as geographic

---

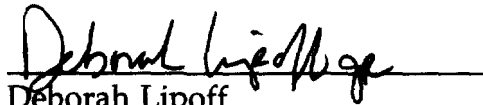
potential taking of our property, demonstrated by the way this important issue is dealt with in the *Notice*.

boundaries for licensing the Spectrum or for any other service not covered in advance by a license from RMC. If the parties are unwilling to enter a license, the Commission should select alternative geographic boundary definitions for service areas. We also urge the Commission to encourage potential Spectrum grantees to seek a copyright license from RMC and to make clear to them that unless a grantee obtains such a license (whether pursuant to a blanket license agreement or other negotiated agreement), it may neither make unfettered use of the MTA/BTA Listings nor rely on a grant of an MTA-based Spectrum license from the Commission as a defense to any claim of copyright infringement brought by RMC against it.

Respectfully submitted,

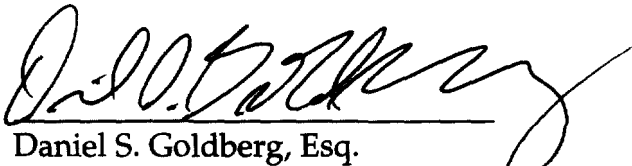
RAND McNALLY & COMPANY

By:



Deborah Lipoff  
Associate General Counsel  
RAND McNALLY & COMPANY  
8255 North Central Park  
Skokie, Illinois 60076  
(708) 329-6258

By:



Daniel S. Goldberg, Esq.  
GOLDBERG, GODLES, WIENER & WRIGHT  
1229 Nineteenth Street, NW  
Washington, D.C. 20036  
(202) 429-4900

Counsel for Rand McNally & Company

March 20, 1995